Filed 9/29/09 P. v. Valdez CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SAUL VALDEZ, Defendant and Appellant.	B212713 (Los Angeles County Super. Ct. No. GA070822)

APPEAL from a judgment of the Superior Court of Los Angeles County. Teri Schwartz, Judge. Affirmed.

A. William Bartz, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H. Borjon and Sharlene A. Honnaka, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Saul Valdez appeals from a judgment of conviction following his plea of nolo contendere. He contends the trial court erred in denying his motion to suppress pursuant to Penal Code section 1538.5, arguing that officers had neither reasonable suspicion to stop the vehicle in which he was a passenger nor a lawful basis to search the vehicle. We affirm. Substantial evidence supported the trial court's conclusion that the traffic stop was justified and the search was lawful notwithstanding new authority governing searches of vehicles incident to arrest.

FACTUAL AND PROCEDURAL BACKGROUND

On September 1, 2007, at approximately 11:25 p.m., City of Burbank Police Officer Nick Nichols was on patrol when he observed a pickup truck with heavily dark tinted side and rear windows. Officer Nichols could not see anything inside of the vehicle because of the tint. Officer Nichols was unaware of the precise amount of tinting that the Vehicle Code allows. Nonetheless, because of the extreme darkness of the truck's windows, he initiated a traffic stop of the truck by activating his overhead lights and a solid red forward facing light.

When the truck stopped in a parking lot, Officer Nichols and his partner exited their vehicle, took a position behind their vehicle's doors and yelled at the truck occupants to roll down their windows. This is the position that the officers would normally assume when they cannot see inside a vehicle. Officer Nichols observed at that point that the truck had a Utah license plate.

After about 45 seconds to one minute, the truck occupants complied and the officers approached the truck. Officer Nichols contacted the driver of the truck, Ivan Flores, while his partner approached the passenger side of the truck where appellant was sitting. Officer Nichols recognized appellant from two prior occasions. During one encounter approximately two years earlier, appellant admitted that he was a member of the Vineland Boys gang and used the moniker Polar Bear. Officer Nichols was aware that a fellow officer had been murdered by a member of the Vineland Boys gang in the same parking lot where he stopped appellant and Flores. During a second encounter

approximately one year earlier, Officer Nichols assisted other officers who had conducted a traffic stop of appellant. When Officer Nichols arrived, the other officers told him that a handgun had fallen from appellant's lap when he exited the vehicle.

At the officers' request, Flores provided a Utah driver's license; appellant stated that he did not have any identification with him. Officer Nichols conducted a records check of both appellant and Flores, and determined that appellant had an outstanding arrest warrant for a violation of Health and Safety Code section 11377 (unlawful possession of a controlled substance), with a bail amount of $10,000. After Officer Nichols learned of the outstanding warrant, he ordered appellant and Flores out of the vehicle. He did so for safety reasons; he was concerned about the lapse of time between the traffic stop and Flores's and appellant's compliance with the order to roll down the windows, the fact that neither appellant nor Flores had produced any registration or proof of insurance, and appellant's admitted gang membership.

After obtaining Flores's consent, Officer Nichols and his partner searched the truck. They saw that the cup holder in the truck front center console had been replaced by a jar. From the console they recovered two handguns, magazines and ammunition for the weapons, a baggie of what appeared to be methamphetamine, a digital scale and a pipe.

An information filed by Los Angeles County District Attorney charged appellant and Flores in count 1 with possession of methamphetamine while armed with an operable firearm (Health & Saf. Code, § 11370.1, subd. (a)); in count 2 with the sale and transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)); in count 3 with carrying a loaded firearm (Pen. Code, § 12031, subd. (a)(1)); and in count 4 with receiving stolen property (Pen. Code, § 496, subd. (a)). As to count 3, the information alleged a gang enhancement (Pen. Code, § 186.22, subd. (b)(1)(A)). Count 5 charged appellant, Flores and three other defendants with conspiracy to commit murder (Pen. Code, §§ 182, subd. (a)(1) & 187, subd. (a)). Appellant pleaded not guilty and denied the special gang allegation.

The trial court denied appellant's Penal Code section 995 motion to dismiss the information. Appellant joined in Flores's motion to suppress evidence pursuant to Penal Code section 1538.5, which the trial court also denied. The motion to suppress challenged only the lawfulness of the vehicle stop. In denying the motion, the trial court reasoned: "It seems to me that the officer testified that he had a reason to believe that the tinted windows on this vehicle were in violation of the law. He testified that he couldn't see inside the vehicle because the windows were so dark. Based on that alone, he stopped this vehicle. I believe that that's sufficient in and of itself to justify the traffic stop in this case."

The trial court granted the prosecution's motion to dismiss count 5 pursuant to Penal Code section 1385. Thereafter, appellant withdrew his plea and pleaded nolo contendere to counts 1, 2 and 3, and admitted the Penal Code section 186.22, subdivision (b)(1)(A) allegation. Count 4 was dismissed as part of the plea negotiation. The trial court denied probation and sentenced appellant to state prison for a total of four years. It imposed the upper term of four years on count 1 and concurrent upper terms of four and three years on counts 2 and 3, respectively. It also struck the mid-term sentence on the gang enhancement in the interest of justice pursuant to Penal Code section 1385. Appellant received 591 days of presentence custody credits and was ordered to pay required fines and assessments.

Appellant appealed from the judgment, specifically challenging the denial of his motion to suppress.

DISCUSSION

Appellant contends that the trial court erroneously denied his Penal Code section 1538.5 motion to suppress for two independent reasons. First, he contends that the officers lacked justification for the traffic stop. Second, he contends that a recent Supreme Court decision, *Arizona v. Gant* (2009) __ U.S. __ [129 S.Ct. 1710, 173 L.Ed.2d 485], establishes that the search of the truck was unreasonable because it was

conducted pursuant to appellant's outstanding arrest warrant. We find no merit to either contention and affirm the judgment.

I. The Traffic Stop was Reasonable.

"'The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment.' [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 384.)

"[A]n officer may stop and detain a motorist on reasonable suspicion that the driver has violated the law. [Citations.] The guiding principle in determining the propriety of an investigatory detention is 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' [Citations.] In making our determination, we examine 'the totality of the circumstances' in each case. [Citations.]" (*People v. Wells* (2006) 38 Cal.4th 1078, 1082–1083.) An ordinary traffic stop is treated as a detention and is reasonable under the Fourth Amendment "*only* if the facts and circumstances known to the officer support at least a reasonable suspicion that the driver has violated the Vehicle Code or some other law." (*People v. Miranda* (1993) 17 Cal.App.4th 917, 926.) "'If the facts are sufficient to lead an officer to reasonably believe that there was a violation, that will suffice, even if the officer is not certain about exactly what it takes to constitute a violation. [Citations.]' [Citation.]" (*In re Justin K.* (2002) 98 Cal.App.4th 695, 700.)

Substantial evidence supported the trial court's determination that the traffic stop was reasonable. Officer Nichols testified that he stopped the truck because it had rear and side windows so heavily tinted that he could not see inside the vehicle. Though he was unaware of the exact limits on tinting, he believed that the fact he could not see into the truck was potentially a Vehicle Code violation. (See *People v. Logsdon* (2008) 164 Cal.App.4th 741, 746 ["the question is not whether [the defendant] *actually* violated the statute. Rather, the issue was if some 'objective manifestation' that the person *may* have committed such an error was present"].)

According to Vehicle Code section 26708, it is unlawful to tint the windows of a vehicle in a manner that reduces or obstructs a driver's view.[1] This provision includes window tinting affixed to the front side windows. (*People v. Niebauer* (1989) 214 Cal.App.3d 1278, 1292 (*Niebauer*).) In ascertaining whether an officer has a reasonable suspicion that window tinting amounts to a Vehicle Code violation, courts do not "call upon the officers to be scientists or carry around and use burdensome equipment to measure light transmittance, nor do we expect them to discuss the sufficiency or insufficiency of the light transmittance as if they were an expert witness on the subject." (*Niebauer, supra,* at p. 1292.) Thus, an officer is justified in making a traffic stop for illegal window tinting when he observes windows that are darker than normal, permitting him to see only the vehicle occupant's outline, even though he has no training or expertise in light transmittance and does not take any light transmittance measurements. (*Id.* at pp. 1292–1293 & fn. 10.)

Appellant attempts to distinguish *Niebauer, supra,* 214 Cal.App.3d 1278 by relying on *People v. Butler* (1988) 202 Cal.App.3d 602. There, an officer observed a Cadillac being driven in a suspicious manner outside a liquor store just prior to 2:00 a.m. He stopped the car because he believed the tinted windows were an "'obvious Vehicle Code violation.'" (*Id.* at p. 605.) Finding the defendant's detention improper, the

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1 At the time of appellant's traffic stop, Vehicle Code section 26708, subdivision (a), provided in relevant part: "(1) No person shall drive any motor vehicle with any object or material placed, displayed, installed, affixed, or applied upon the windshield or side or rear windows. [¶] (2) No person shall drive any motor vehicle with any object or material placed, displayed, installed, affixed, or applied in or upon the vehicle which obstructs or reduces the driver's clear view through the windshield or side windows." (Stats. 1998, ch. 476, § 1.) Vehicle Code section 26708, subdivision (d) further provides in relevant part: "Notwithstanding subdivision (a), clear, colorless, and transparent material may be installed, affixed, or applied to the front side windows . . . if the following conditions are met: [¶] (1) The material has a minimum visible light transmittance of 88 percent. [¶] (2) The window glazing with the material applied meets [federal vehicle safety standards], including the specified minimum light transmittance of 70 percent . . . ."

appellate court concluded there were no facts in the record indicating that the officer had a "reasonable suspicion that the windows in the Cadillac were made of illegally tinted, rather than legally tinted, safety glass." (*Id*. at p. 606.) The court explained: "We disagree with the People's suggestion that seeing someone lawfully driving with tinted glass raises a reasonable suspicion of illegality such that a reasonable inquiry is justified. Without additional articulable facts suggesting that the tinted glass is illegal, the detention rests upon the type of speculation which may not properly support an investigative stop." (*Id.* at p. 607.)

Niebauer, supra, 214 Cal.App.3d 1278 is distinct to the extent it illustrates the type of additional facts that will justify such a traffic stop. In that case, the court relied on an officer's credible testimony that he believed the tinting exceeded the legal limit: "If an officer forms an opinion in a commonsense examination of a vehicle that there is a film placed upon the vehicle's windows in an unauthorized place or that light is obstructed in the fashion contemplated by the statute, such evidence will be sufficient to support conviction under [Vehicle Code] section 26708(a) if the trial court believes the officer; no further evidence or scientific testimony need be presented." (*Id.* at p. 1292.) There, the officer testified that he stopped the defendant because "the windows were darker than normal and he could only see Niebauer's outline through the window." (*Ibid.*) Although *Niebauer* involved a substantial evidence challenge to the conviction rather than a Fourth Amendment challenge, the court observed that the facts presented would also justify an investigative stop because the officer "testified to additional facts giving him reasonable suspicion Niebauer was driving with illegally tinted windows other than merely the bare statement Niebauer's truck had tinted windows." (*Niebauer, supra,* at p. 1293, fn. 10.)

The court in *People v. Hanes* (1997) 60 Cal.App.4th Supp. 6 (*Hanes*) applied the reasoning in *Niebauer* to a Fourth Amendment challenge. The officer who stopped the defendant had experience stopping vehicles on suspicion of illegally tinted windows and testified that the tinting on the defendant's car windows was so dark that "he was unable to see the occupants of the vehicle." (*Hanes, supra,* at p. 8.) On this basis, the court

found the detention reasonable, noting that the Fourth Amendment "permits detention based on articulable suspicious facts even though not necessarily inconsistent with innocent activity." (*Hanes, supra,* at p. 9.)

Here, too, Officer Nichols articulated a reasonable suspicion that the tinting on the truck's windows violated the Vehicle Code, stating that the tinting prevented him from seeing into the truck at all, even when he focused his headlights on the truck. That the truck had Utah license plates is of no consequence. *Niebauer, supra,* 214 Cal.App.3d 1278, rejected the argument that Vehicle Code section 26708 places an undue burden on out of state motorists, even though "'an individual out-of-state motorist might have to incur substantial expense to remove tinting before entering California . . . .'" (*Niebauer, supra,* at p. 1289.) The court held, "as a matter of law that section 26708(a), prohibiting the application of any material or objects to the windshield and driver's front side windows of a vehicle, incorporates the federal standard that light transmission will not be at a level below 70 percent, promotes legitimate highway safety concerns and is constitutional on its face." (*Id.* at p. 1290.) Accordingly, we find no basis to disturb the trial court's determination that the traffic stop of appellant was reasonable under the Fourth Amendment.

II. The Search was Proper.

Appellant further contends that the search of the truck was not justified according to the United States Supreme Court's recent decision in *Arizona v. Gant, supra,* __ U.S. __ [129 S.Ct. 1710, 173 L.Ed.2d 485]. There, departing from previous authority permitting the search of a vehicle incident to arrest even when the arrestee has been removed from the vehicle and secured, the Court held the police may "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." (*Arizona v. Gant, supra,* 173 L.Ed.2d at p. 496.) The Court added: "[W]e also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.' [Citation.]" (*Ibid.*)

Here, the record indicated that Officer Nichols had ordered appellant and Flores out of the truck before the search. The trial court indicated that it found the search was justified on the basis of appellant's and Flores's delay in complying with the police order to roll down the truck windows and because of Officer Nichols's prior contact with appellant. The trial court stated: "I think all of that supports the subsequent search which occurred pursuant to what was about to be an arrest because there was an outstanding warrant." Despite this statement, the People correctly assert that below appellant did not challenge the propriety of the search beyond the validity of the traffic stop.

Generally, a defendant has the burden of specifying "the precise grounds for suppression of the evidence in question, and, where a warrantless search or seizure is the basis for the motion, this burden includes specifying the inadequacy of any justifications for the search or seizure." (*People v. Williams* (1999) 20 Cal.4th 119, 130.) Correspondingly, "[d]efendants who do not give the prosecution sufficient notice of these inadequacies cannot raise the issue on appeal." (*Id*. at p. 136.) Though the People urge that appellant's argument should therefore be deemed waived, the forfeiture rule does not apply when the pertinent law changes so unforeseeably that it is unreasonable to expect counsel to have anticipated the change. (*People v. Black* (2007) 41 Cal.4th 799, 810.) In view of the trial court's comment that one basis for its finding the search reasonable was the existence of appellant's outstanding warrant—a ground rejected in *Arizona v. Gant, supra,* 173 L.Ed.2d 485—we decline to find that appellant forfeited his challenge to the propriety of the search.

Nonetheless, the new rule articulated in *Arizona v. Gant* affords no basis for reversal of the denial of the motion to suppress because the evidence was undisputed that Flores consented to the search. As summarized in *People v. Woods* (1999) 21 Cal.4th 668, 674: "A search conducted without a warrant is unreasonable per se under the Fourth Amendment unless it falls within one of the 'specifically established and well-delineated exceptions.' [Citations.] It is 'well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.' [Citations.]" Moreover, "[i]t long has been settled that a

consent-based search is valid when consent is given by one person with common or superior authority over the area to be searched; the consent of other interested parties is unnecessary." (*Id*. at p. 675.) According to the record, Officer Nichols testified that he asked Flores if he had consent to search the truck and that in response Flores provided him with consent. These circumstances are indistinguishable from those in *People v. Williams* (1980) 114 Cal.App.3d 67, 71, where the court determined the defendant's consent to search was voluntary and not the result of mere submission to an express or implied assertion of authority on the basis of evidence that officers stopped the defendant, he had exited his car and may have been handcuffed when an officer asked "'May I search your car?' [and] Defendant 'said something to the effect, "Yes, go ahead."'"

Accordingly, we find no basis to reverse the trial court's denial of appellant's motion to suppress or to remand the matter for further proceedings in light of new authority.

DISPOSITION

The judgment is affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ